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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 39.

39

THE UNITED STATES,

Petitioner,

v.

THE TORONTO, HAMILTON AND BUFFALO NAVIGATION COMPANY.

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

BRIEF FOR RESPONDENT.

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BRIEF FOR RESPONDENT.

This is an appeal by the United States from a judgment of the Court of Claims entered on December 6, 1948, on writ of certiorari granted by this Court on May 2, 1949 (336 U. S. 965). The opinion of the Court of Claims is reported at 81 F. Supp. 237. The jurisdiction of this Court is invoked under the provisions of Section 1255 of the Judicial Code, 28 U. S. C. 1255 (1).

Statement.

The War Shipping Administration appropriated from respondent, pursuant to the Merchant Marine Act of 1936 (46 U. S. C. 1242), its railroad car ferry "Maitland No. 1" and fixed $72,500 as fair value (Finding 3; R. 4). Respondent notified petitioner

that said sum was unsatisfactory and elected to sue the United States to recover the sum of $711,753 as just compensation for the vessel (R. 3; Finding 4; R. 4).

The Court of Claims found that the fair value of the "Maitland No. 1" at the time of the requisition was $161,833.72 (Finding 22; R. 14).

At the time she was requisitioned the use to which the "Maitland No. 1" was best adapted was as a car ferry on the Great Lakes, the use for which she had been built. At that time, however, there was no demand for a vessel as a car ferry on the Great Lakes (Finding 17; R. 9, 10) and therefore no market established by transactions in comparable vessels.*

Under the circumstances, the court had to turn to methods other than the market value at the place of taking to establish the value of the property taken (R. 22).

There was a demand for a vessel such as the "Maitland No. 1" for use as a car ferry between Florida and Cuba, as shown by the fact that in June 1942 the

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* The petitioner argued and continues to argue (Petitioner's Brief, pp. 2, 7-10, 16, 20, 26, 33-34, 39-42) that sales on the Great Lakes of five obsolete car ferries which had been permitted to deteriorate to such condition that hundreds of thousands of dollars would have been required to restore them to usefulness (Findings 18, 21; R. 11, 13-14) established a "market" applicable to the "Maitland No. 1", which had at all times been kept in operating condition and repair (Finding 13; R. 8) and by agreement of both parties required the expenditure of less than $35,000 to place her in full operating condition (Finding 14; R. 9). The court's ultimate finding that these sales did not establish a market value for the "Maitland" is amply supported by the unchallenged findings of fact with respect to the disparity between the condition of the "Maitland No. 1" and the condition of the other five vessels and between the cost required to place the "Maitland" in operating condition and the cost required to place the other five vessels in operating condition.

War Shipping Administration requisitioned from the Florida East Coast Car Ferry Company two ocean-going car ferries, the "Joseph R. Parrott" and the "Estrada Palma", both comparable in age, size, dimensions, engines, power, boilers, auxiliaries, and type of construction to the "Maitland No. 1". By negotiation between the United States and the Florida East Coast Company the parties agreed upon a value of $665,000 for both vessels (Finding 20; R. 11-13).

During the 16-year period of its operation respondent's average annual income from the "Maitland No. 1" amounted to $42,816.36 (Finding 10; R. 6).

The sales on the Great Lakes of the obsolete and deteriorated car ferries represented their residual values for secondary uses, and produced an average residual value of $50,000 (R. 23).

By taking this residual value of $50,000 and capitalizing the average annual earnings of the "Maitland No. 1" at 10% for the term of its unexpired normal life the court arrived at an amount of $389,767.15 (R. 23), an approximate equivalent to the sums paid by the United States for the ocean car ferries "Joseph R. Parrott" and "Estrada Palma" (R. 24).

From the figure so found the Court of Claims deducted amounts representing the cost of moving the vessel to Florida and converting to salt water use, the agreed cost of repairs, and the shortened life in salt water, and arrived at its net awarded value of $161,833.72.

Summary of Argument.

The petitioner asserts that the Court of Claims erred by fixing valuation through capitalization of past earnings; by consideration of a demand existing in Florida for a vessel of the type of the "Maitland" as shown by the contemporaneous requisition of two comparable vessels in Florida; and in failing to fix a value of the "Maitland" on the basis of sales on the Great Lakes of vessels of the same type but in far poorer condition than the "Maitland".

1. Petitioner misconstrues the holding of the court. The court did not award the capitalized value of the earlier earnings of the vessel, but merely used capitalization of earnings as a starting point "in conjunction with the contemporaneous transactions in vessels of close similarity" (R. 23), a proper method of approach in the absence of an established market at the place of requisition.

2. The court properly considered the requisitioning of comparable vessels in Florida as one element of its findings, and awarded a sum of approximately half the amount of the requisition sales. The value of an article of mobile personal property may be determined by reference to a market at a place to which it can be moved, with appropriate deductions for the cost of moving and other necessary expenses; its valuation is not restricted to a market at the place of taking.

3. The finding by the court that the sales relied on by petitioner did not constitute an established market is required by the primary facts.

ARGUMENT.

I.

The Court of Claims properly determined the value of the "Maitland" by reference to a combination of factors, in the absence of a market at the place of taking.

While the ordinary method of estimating the value of requisitioned property is by reference to a market established by numerous sales at the place of taking, in the absence of such a market other factors must be taken into consideration. *United States* v. *Miller*, 317 U. S. 369, 374; *Standard Oil Co.* v. *So. Pacific Co.*, 268 U. S. 146, 155. Among the recognized factors which may be considered is the capitalized value of earnings. *Kimball Laundry Co.* v. *United States*, 338 U. S. 1, 16; Report of Advisory Board on Just Compensation, Rule 3.

In this case the court used capitalization of earnings only as a starting point. The average annual earnings of the "Maitland" during the 16-year period of its operation amounted to $42,816.36 (Finding 10; R. 6).

Petitioner's principal argument, supported by citation of numerous authorities for the proposition that the validity of valuation by the capitalization method depends on a showing of current or prospective earnings, misconstrues the holding of the court. The principle cited has no application to the issue before this Court for the reason that the Court of Claims did not, as petitioner contends, make an award in the amount of its capitalization of past earnings.

The capitalized value of the past earnings was $389,767.15. The award was $161,833.72.

As the court pointed out, it considered this capitalized figure only in conjunction with contemporaneous transactions in other similar vessels. It clearly did not arrive at its award by capitalizing the actual earnings (R. 23).

II.

The valuation of mobile personal property is not restricted to the market at the place of taking.

The court checked the amount at which it had arrived by capitalization of earnings against valuations agreed upon by negotiation between petitioner and the Florida East Coast Car Ferry Company. In June 1942 the War Shipping Administration requisitioned from the Florida East Coast Car Ferry Company two ocean-going car ferries comparable in all respects with the "Maitland". By negotiation between the United States and the Car Ferry Company a value of $665,000 for both vessels was agreed upon (Finding 20; R. 11-13), an amount approximating the amount arrived at by capitalization of the "Maitland's" earnings (R. 24).

The authorities cited by petitioner for the principle that the value of property taken is to be determined as of the time and place of taking are not here applicable since they relate to real property, or interests in real property, which have a fixed situs.

"If there is no market for the article at the place where the plaintiff would be entitled to compensation, the value at the nearest market governs." 1 Sedgwick on Damages, Ninth Edition, Sec. 246. We agree with petitioner's statement of the true rule with respect to mobile personal property that "personalty may have as many market values as there are 'markets', and its selling price is not necessarily circumscribed by the existing wants of the community in which it is located".

The court did not award the sum for which the comparable vessels requisitioned by the government had been agreed upon, namely, $332,500 each, but awarded only $161,833.72. The court's award was arrived at by deducting from its capitalized value on the Great Lakes the expenses of repairing the vessel, moving it to Florida, converting it to salt water use, and allowing for the shorter life due to use in salt water.

III.

The award appealed from is sustained by the findings.

The petitioner argues that the court should have used the sales of the obsolete and deteriorated vessels on the Great Lakes as establishing a market value. The soundness of the court's ultimate finding to the contrary is shown by the evidentiary findings.

The "Maitland", which was built in 1916 (Finding 6; R. 5), retained a captain and chief engineer on board as shipkeepers during the entire time she was laid up. "One of the boilers was fired up every winter and the engines were turned over periodically.

The main and auxiliary engines were kept lubricated, the bright work was greased and minor repairs, of the kind needed to keep the vessel from deteriorating, were made from time to time" (Finding 13; R. 8). The agreed cost of repair required to place her in operating condition was only $34,080 (Finding 14; R. 9).

The "Pere Marquette No. 17" and the "Pere Marquette No. 20", which were built in 1901 and 1903, respectively, were in a much poorer state of repair than was the "Maitland No. 1" on the date of the requisition (Finding 18; R. 11).

Nothing was spent for maintenance of or repairs to the "Pere Marquette No. 20" from the time she was laid up until the date she was sold for $50,000. As early as 1936, the owners estimated that it would cost $173,700 to place her in operating condition for use as a car ferry for a period of only five years. The Michigan Highway Department spent $215,000 for repairing and remodeling her (Finding 19; R. 11).

The "Pere Marquette No. 17" was sold to the Michigan Highway Department for the sum of $65,000. In 1936 the owners estimated that an expenditure of $147,200 would have been required to place her in operating condition as a car ferry for a period of five years. The Highway Department expended $534,000 for remodeling and reconditioning this vessel (Finding 19; R. 11).

The owners of the "Pere Marquette No. 19" estimated, just before she was sold in 1940 for $24,000, that an expenditure of $308,000 would be needed to put her in operating condition.

The "Marquette & Bessemer No. 2", built in 1910, was sold for $37,724.04. Prior to the sale the owners

estimated that it would take an expenditure of $300,000 to place her in condition to operate (Finding 21; R. 14).

The "Ann Arbor No. 4" and the "Grand Haven" were both smaller than the "Maitland No. 1", and there was no evidence as to their condition. Thus their sales do not form a proper basis for determining the value of the "Maitland No. 1".

The sales prices realized for all these hulks (called residual value) could not establish a market applicable to the "Maitland".

Indeed, while not expressly stated in the opinion or findings of fact of the Court of Claims it seems clear that the consideration of the sales prices of these deteriorated car ferries and of the amounts required to put them in proper operating condition as compared with the amount required for conditioning the "Maitland" furnished further support for the award made for the "Maitland".

The argument that the value assigned to the "Maitland" by the War Shipping Administration was generous is completely refuted by the petitioner's own evidence offered on direct examination of the expert witnesses called by it. If any error was made by the Court of Claims such error was favorable to petitioner; the evidence would sustain a much higher award, since the Court of Claims made no finding with respect to the proof of value based upon reproduction cost less depreciation testified to by witnesses for both parties.

The amount for which the owner saw fit to insure the "Maitland" while she was laid up and not exposed to the perils of navigation is no criterion of value; the actual amount of insurance carried is a far

different thing from the "appraisals for insurance or other purposes" approved as a test of value by the Advisory Board on Just Compensation. Neither is the value at which property is carried on the books of its owner of any weight in determining true value. *Spreckels-Rosenkrans Inv. Co.* v. *Lewis,* 146 Fed. (2d) 982; *Ewen* v. *Peoria & E. Ry. Co.,* 78 F. Supp. 312, 331; cert. den. 336 U. S. 919.

The contention that the court should have deducted from its award the sum of $11,420 representing the enhancement of values of vessels on the Atlantic coast between 1941 and 1942 is not sustained by the case of *United States* v. *Cors,* 337 U. S. 325, since in the *Cors* case the holding of the majority depended upon a finding of fact that the enhancement in value was due to "the Government's need for vessels", and there is no such finding in this case.

CONCLUSION.

We respectfully submit that the judgment awarded by the Court of Claims was based upon proper methods of appraisal and should be in all respects affirmed.

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